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No. 00-1021

IN THE

Supreme Court of the United States

RUSH PRUDENTIAL HMO, INC.,
Petitioner,

v.

DEBRA C. MORAN AND STATE OF ILLINOIS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER[1]

1. In dissenting from denial of the petition for rehearing en banc in the Seventh Circuit, Judge Posner observed that the panel decision in this case "creates a square conflict" with the Fifth Circuit's decision in *Corporate Health Ins., Inc.* v. *Texas Dep't of Ins.*, 215 F.3d 526 (5th Cir.), *further opinion on pet. for reh'g*, 220 F.3d 641 (5th Cir. 2000), *pet. for cert. filed sub nom., Montemayor* v. *Corporate Health Ins., Inc.*, 69 U.S.L.W. 3317 (Oct. 24, 2000) (No. 00-665). *See* Pet. App. 24a. Indeed, the panel itself recognized that its decision was in conflict with the Fifth Circuit's decision in

[1] Petitioner's Rule 29.6 Statement appears at Pet. ii.

Corporate Health. Pet. App. 23a n.7. Despite the obvious pertinence of *Corporate Health* to the Court's consideration of the petition in this case, Respondent Moran's Brief in Opposition ("Opp.") simply ignores the fact that, on January 8, 2001, this Court invited the Solicitor General to file a brief expressing the views of the United States in *Corporate Health*.[2]

Even respondent recognizes, however, that the views of the government are pertinent to the ERISA preemption question presented here. *See* Opp. 15-16 (contending that the Department of Labor supports the decision below). Thus, in all events, the Court should hold the petition in this case pending receipt of the Solicitor General's response to this Court's invitation in *Corporate Health*.

2. Respondent's effort to forestall that obvious course of action by citing perceived differences between this case and *Corporate Health* is unavailing. She contends that a decision in *Corporate Health* "will not dispose of this action" because *Corporate Health* "was decided on a sterile record," and not, as here, "on an individual insured's action for coverage of a specific procedure under a particular insurance policy." Opp. at 20. If anything, however, those factors make this case a *more* compelling one for plenary consideration than *Corporate Health*. Unlike *Corporate Health*, this case comes to the Court on a well-developed record and in a concrete factual setting, after discovery and summary judgment proceedings. It thus bears more of the hallmarks of "a dis-

[2] The State of Illinois, which is also a respondent, has responded to the obvious circuit conflict by waiving its right to file a Brief in Opposition.

pute capable of judicial resolution," which the Court has identified as "sharply presented issues in a concrete factual setting and self-interested parties vigorously advocating opposing positions." *United Sates Parole Comm'n* v. *Geraghty*, 445 U.S. 388, 403 (1980).

Of course, if the Court is concerned that apparent differences between this case and *Corporate Health* might affect a determination of which of these conflicting cases it ought to review, it could invite the Solicitor General to express the views of the United States in this case as well. No response to the *Corporate Health* invitation has been filed, and the Solicitor General would therefore still have the opportunity to offer the views of the United States on these cases in a comprehensive way.

3. Respondent does suggest that pending federal legislation might forestall the need for review here.[3] The existence of legislative proposals—particularly ones that are the subject of "partisan disagreement," Opp. at 2—hardly provides a basis for this Court to deny review of a live conflict in the courts on a question of widespread importance. Even a passing familiarity with the legislative process counsels against predicting the outcome of any that process. To suggest that the Court simply stand by in the hopes that a Congress attempting to resolve "partisan disagreement" over particular bills might one day reach a resolution on the issue involved here is to disregard this Court's responsibility for resolving existing disagreements between the federal circuits. Respon-

[3] Moran claims that we "fail[ed] to advise the Court" of the existence of such legislation. Opp. at 2. Not so. *See* Pet. at 21.

dent's chimerical hopes for a legislative solution provide no basis for declining to review the decision below.

4. Turning to the question whether the Court should grant review, we agree with several key points in the Opposition. First, respondent Moran "does not deny that the Seventh Circuit's decision is important." Opp. at 1. Second, she recognizes that "a number of states now have [independent review] laws" like the one at issue here. *Id.* Third, although she makes a passing effort to distinguish the Fifth Circuit's decision in *Corporate Health* on the merits, *see* Opp. at 9, 20, she recognizes at least that the decisions are in serious tension with one another. As noted, the Seventh Circuit itself has no doubt that that cases are in conflict. For the reasons explained in the Petition, these factors alone counsel strongly in favor of review, Pet. at 13-20, and Moran offers no effective response to our demonstration that the factors normally motivating this Court to grant certiorari are present here.

Instead, the Brief in Opposition is largely devoted to Moran's attempt to demonstrate that the Seventh Circuit panel decision is correct. *See* Opp. at 6-19. Needless to say, however, where there is an obvious conflict between the circuits, and where the court below was sharply divided (not, as Moran suggests, "unanimous," Opp. at 9, 13), Moran's extended discussion of the *merits* of the issue is misguided and premature. We of course analyze the issue quite differently, Pet. at 23-25—as did the Fifth Circuit and the dissent from denial of rehearing in the Seventh Circuit—but there will be time enough for those arguments if the Court grants review.

For now, the Court should hold the petition here pending receipt of the views of the United States in *Corporate Health*. After the submission of supplemental briefs pursuant to S. Ct. Rule 15.8 commenting on those views, the Court should grant the petition to resolve the acknowledged circuit conflict.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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